Supreme Court, U.S.
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No. 01-1362

In the Supreme Court of the United States

TAREK ELAGAMY, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DONALD E. KEENER
LINDA S. WERNERY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly upheld the determination of the Board of Immigration Appeals (BIA) that Section 309(c)(5)(A) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-627, as amended by Section 203(a)(1) of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, Tit. II, 111 Stat. 2196, precludes a grant of suspension of deportation to petitioner under former 8 U.S.C. 1254(a) (1994).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A21-A23) is unpublished, but the judgment is noted at 281 F.3d 1279 (Table). The decisions of the immigration judge (Pet. App. A1-A8) and the Board of Immigration Appeals (Pet. App. A9-A20) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 29, 2001. A petition for rehearing was denied on January 29, 2002. Pet. App. A24. The petition for a writ of certiorari was filed on March 7, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Before the amendments to the Immigration and Nationality Act (INA) enacted by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, an alien who was subject to deportation could apply for suspension of deportation and adjustment of status to that of a lawful permanent resident (LPR). 8 U.S.C. 1254(a) (1994).[1] Such relief was available in the discretion of the Attorney General. To qualify for consideration, the alien was required to demonstrate, *inter alia*, that he had been physically present in the United States for a continuous period of "not less than seven years immediately preceding the date of such application [for relief]," 8 U.S.C. 1254(a)(1) (1994), or, in the case of an alien deportable under 8 U.S.C. 1251(a)(2), (3) or (4) (1994), "not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation," 8 U.S.C. 1254(a)(2) (1994).[2] Under pre-IIRIRA law, the time that an alien spent in deportation proceedings before issuance of a final order of deportation was counted towards the requirement of seven or ten years' continuous physical presence in the United States.

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[1] Unless otherwise indicated, references in this brief to Title 8 of the United States Code are to the current (2000) edition of that title. References to earlier editions of Title 8 are so designated in the brief.

[2] The alien was also required to demonstrate that he was of good moral character, and that his deportation would result in "extreme hardship," or, in the case of an alien deportable under 8 U.S.C. 1251(a)(2), (3) or (4) (1994), "exceptional and extremely unusual hardship" to himself or a spouse, parent, or child who was a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. 1254(a)(1) and (2) (1994).

See, *e.g.*, *Vargas-Gonzalez* v. *INS*, 647 F.2d 457, 458 (5th Cir. 1981).

On September 30, 1996, Congress enacted IIRIRA. In IIRIRA, Congress abolished the old distinction between deportation and exclusion proceedings, repealed the provision for suspension of deportation in former 8 U.S.C. 1254(a) (1994), instituted a new form of proceeding known as "removal," and established a new form of discretionary relief from removal, known as "cancellation of removal." See 8 U.S.C. 1229(a), 1229b. Under the last provision, the Attorney General may in his discretion cancel the removal of an alien who has not been convicted of certain enumerated offenses, if the alien demonstrates, among other things, that he has resided in the United States continuously for seven years (if the alien is an LPR) or has been continuously present in the United States for ten years (if the alien is not an LPR). 8 U.S.C. 1229b(a) and (b).

For purposes of eligibility for cancellation of removal, however, the alien's continuous residence or physical presence in the United States is "deemed to end * * * when the alien is served a notice to appear," 8 U.S.C. 1229b(d)(1), not (as under prior law) when the alien's application for relief is finally adjudicated. The Notice to Appear is the document that commences removal proceedings under IIRIRA, and replaces the old Order to Show Cause (OSC), which commenced deportation proceedings under the INA before IIRIRA. See 8 U.S.C. 1229(a). Thus, IIRIRA instituted a new rule (known as the "stop-time" rule), under which the commencement of removal proceedings cuts off the time that is counted towards establishing an alien's eligibility for cancellation of removal, and the time that an alien subsequently spends in removal proceedings is not counted.

The new cancellation-of-removal provisions were generally not made applicable to aliens whose immigration proceedings were commenced prior to April 1, 1997, the general effective date of IIRIRA. Rather, most new provisions of IIRIRA were made applicable only to removal proceedings instituted after a transition period, which ended on April 1, 1997. See IIRIRA § 309(a), 110 Stat. 3009-625. IIRIRA did, however, contain a special "transitional rule with regard to suspension of deportation," which provided that the new stop-time rule was to apply to "notices to appear" issued before, on, or after the date of enactment of IIRIRA, *i.e.*, September 30, 1996. Specifically, Section 309(c)(5) of IIRIRA originally provided:

> TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [(8 U.S.C. 1229b(d)] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

110 Stat. 3009-627.

b. After enactment of IIRIRA, aliens in deportation proceedings argued that the new stop-time rule of 8 U.S.C. 1229b(d)(1) did not apply to proceedings commenced before the general April 1, 1997, effective date of IIRIRA. That argument was based on the language in IIRIRA Section 309(c)(5)(A) directing that the new stop-time rule be applied in cases in which a "notice to appear" had been issued. Under deportation proceedings initiated before IIRIRA's effective date, no document known as a "notice to appear" existed, and proceedings were commenced by an Order to Show Cause.

On February 20, 1997, the Board of Immigration Appeals (BIA) rejected that argument, and held that, effective September 30, 1996, IIRIRA's new stop-time rule applies to all pending and future deportation proceedings, including those commenced before IIRIRA was enacted. *In re N-J-B-*, 21 I. & N. Dec. 812 (BIA 1997). The BIA first held that the stop-time rule became effective on IIRIRA's enactment date of September 30, 1996, rather than on IIRIRA's general effective date of April 1, 1997. *Id.* at 814-815. The BIA further concluded that the term "notice to appear" in IIRIRA Section 309(c)(5)(A) referred generically to a document initiating proceedings, and that, because Section 309(c)(5)(A) expressly referred to such a document "issued before, on, or after" IIRIRA's enactment date, it necessarily included an Order to Show Cause issued before that date. *Id.* at 817-819. On July 10, 1997, Attorney General Reno, exercising her authority under 8 C.F.R. 3.1(h)(1)(i), vacated the BIA's decision in *N-J-B-* and certified the case to herself for her review and determination. See *In re N-J-B-*, Interim Dec. 3415, 1999 WL 1390344 (A.G. July 10, 1997).

c. On November 19, 1997, while *N-J-B-* was still pending before the Attorney General, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. 105-100, Tit. II, 111 Stat. 2193. Section 203(a)(1) of NACARA amended IIRIRA Section 309(c)(5) to make clear that the stop-time rule of IIRIRA applies even to deportation proceedings opened before April 1, 1997, by service of an Order to Show Cause (rather than a Notice to Appear). NACARA Section 203(a)(1) amended IIRIRA Section 309(c)(5) to read in part as follows:

> (A) IN GENERAL.— * * * [P]aragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [(8 U.S.C. 1229b(d)] (relating to continuous residence or physical presence) shall apply to *orders to show cause* (including those referred to in section 242B(a)(1) of the Immigration and Nationality Act, as in effect before the title III-A effective date), issued before, on, or after the date of the enactment of this Act.

111 Stat. 2196 (emphasis added). Section 203(f) of NACARA also made that amendment effective as if included in the original enactment of IIRIRA. 111 Stat. 2200. In *In re Nolasco-Tofino*, Interim Dec. 3385, 1999 WL 261565 (BIA Apr. 15, 1999), the BIA held that, under the NACARA amendment, the new stop-time rule applies to deportation proceedings that were pending at the time of IIRIRA's enactment (except in the cases of certain aliens who qualified for a statutory exemption), regardless of the nature of the initiating document.[3]

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[3] NACARA created an exception to the new stop-time rule for certain qualifying aliens from El Salvador, Guatemala, and Eastern Europe. That exception allowed qualified nationals of those countries to apply for suspension of deportation or cancellation of removal without having their period of continuous physical presence stopped at the time that an Order to Show Cause was served on them. See NACARA § 203(a)(1) (adding new IIRIRA § 309(c)(5)(C)), 111 Stat. 2196-2198. NACARA also provided certain Nicaraguan nationals with another, broader form of relief. NACARA provided qualified Nicaraguans the opportunity to apply directly for adjustment of status to LPR, without the need also to apply for suspension of deportation (including the need to show that deportation would cause hardship). See NACARA § 202(b)(1), 111 Stat. 2194. A similar privilege was extended to certain Haitian nationals in the Haitian Refugee Immigration Fairness Act of 1998, Pub. L. No. 105-277, Div. A, § 101(h), Tit. IX,

2. Petitioner is a native and citizen of Egypt who entered the United States on May 15, 1982, as a non-immigrant student, authorized to remain in the United States until December 31, 1985. Certified Administrative Record (C.A.R.) 8, 790-793. On September 19, 1983, petitioner adjusted his status to that of a lawful permanent resident (LPR) based upon a marriage to a United States citizen that was later proven to be fraudulent. C.A.R. 8. 790, 793. On September 10, 1986, petitioner was convicted in the United States District Court for the Eastern District of Louisiana of making a false statement under oath in violation of 18 U.S.C. 1546, based on false statements he had made to the Immigration and Naturalization Service (INS) regarding his fraudulent marriage. C.A.R. 8, 742, 790-791. Petitioner was sentenced to a suspended term of five years' imprisonment, and was placed on five years' probation. C.A.R. 742.

On December 17, 1986, petitioner was placed in deportation proceedings by the filing of an OSC. C.A.R. 791-792. The OSC was personally served on petitioner on the same day. C.A.R. 792. The OSC charged petitioner with being subject to deportation pursuant to 8 U.S.C. 1251(a)(5) (1988), based on his conviction under 18 U.S.C. 1546. C.A.R. 791-792.[4]

At a deportation hearing held on April 20, 1988, an immigration judge found petitioner deportable as

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§ 902(b), 112 Stat. 2681-538. Citizens of Egypt, such as petitioner, were not granted special relief from the stop-time rule.

[4] At the time petitioner's deportation proceeding was commenced, Section 1251(a)(5) of Title 8 rendered deportable any alien "convicted under section 1546 of title 18." See 8 U.S.C. 1251(a)(5) (1988). That basis of deportability was subsequently transferred to 8 U.S.C. 1251(a)(3)(B)(iii) (1994), and now appears at 8 U.S.C. 1227(a)(3)(B)(iii).

charged and denied his applications for asylum and withholding of deportation. Pet. App. A2-A8. The BIA affirmed that decision on June 24, 1992. *Id.* at A9-A13.

On August 9, 1993, petitioner filed a motion to reopen with the BIA, requesting the discretionary relief of suspension of deportation pursuant to 8 U.S.C. 1254(a)(2) (1994). C.A.R. 463-476. On February 9, 1995, the BIA denied petitioner's motion, holding that he had not satisfied the statutory requirement of ten years' continuous physical presence following his offense, which, according to BIA precedent, commences on the date of the alien's conviction for the offense rendering him deportable, not, as petitioner argued, from the date of the alien's commission of that offense.[5] Pet. App. A14-A17. Petitioner filed a petition for review with the United States Court of Appeals for the Fifth Circuit, which was denied on August 22, 1995. 68 F.3d 465 (Table). This Court denied petitioner's petition for a writ of certiorari on January 16, 1996. 516 U.S. 1071 (1996).

On September 17, 1996, petitioner filed another motion to reopen with the BIA, again seeking suspension of deportation. C.A.R. 5-20. On March 17, 1997, the BIA denied petitioner's motion based on its

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[5] Under Section 1254(a)(2), an alien was required to show that he had been "physically present in the United States for a continuous period of not less than ten years immediately following the commission of an act, or the assumption of a status, constituting a ground for deportation." Petitioner was required to apply for suspension of deportation under the more stringent rules of 8 U.S.C. 1254(a)(2) (1994), rather than those of 8 U.S.C. 1254(a)(1) (1994), because he had been convicted of an offense under 18 U.S.C. 1546, which, at the time he applied for suspension, was chargeable as a basis for deportation under 8 U.S.C. 1251(a)(3)(B)(iii) (1994).

ruling in *N-J-B-* that IIRIRA's new stop-time rule applied in all deportation proceedings immediately upon IIRIRA's enactment. Pet. App. A18-A20. The BIA rejected petitioner's argument that it should follow the Ninth Circuit's decision in *Astrero* v. *INS*, 104 F.3d 264 (1996), in which that court held that the new stop-time rule did not become effective until IIRIRA's general effective date of April 1, 1997. The BIA noted that it had already rejected that interpretation of IIRIRA Section 309(c)(5)(A) in *N-J-B.* Pet. App. A20 n.1. Accordingly, the BIA concluded that petitioner was statutorily ineligible for suspension of deportation because he had not accrued the requisite ten years' continuous physical presence in the United States before he was served with the OSC commencing his deportation case.[6] *Id.* at A19-A20.

3. On April 8, 1997, petitioner filed a petition for review of the BIA's decision in the United States Court of Appeals for the Fifth Circuit. In his opening brief, petitioner argued that the BIA erred in *N-J-B-* when it held that IIRIRA's new stop-time rule applied to deportation proceedings commenced before IIRIRA was enacted. Petitioner also argued that, even if he had not accrued the requisite seven years' continuous physical presence before he was served with the OSC in 1986, he had accrued a new period of seven years' continuous physical presence after he was served with the OSC, which made him eligible for suspension of deportation.

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[6] Petitioner was convicted of a deportable offense on September 10, 1986, and was served with an OSC on December 17, 1986. Thus, for purposes of his eligibility for suspension of deportation pursuant to 8 U.S.C. 1254(a)(2) (1994), petitioner had accumulated only three months' continuous physical presence, as that term is defined in 8 U.S.C. 1229b(d)(1), by the time he was served with the OSC. See C.A.R. 8, 790-793.

After petitioner filed his opening brief, the court of appeals granted several motions to stay the briefing schedule. In April 2001, petitioner filed a reply brief in which he argued for the first time that the new stop-time rule did not become effective until IIRIRA's general effective date of April 1, 1997, or 15 days after the BIA decided his case.

In an unpublished decision issued on November 29, 2001, the court of appeals denied the petition for review. Pet. App. A21-A23. The court first deemed petitioner's challenge to *N-J-B-* to be abandoned because (it stated) petitioner had not presented any legal analysis or authority to support his contentions. *Id.* at A22. The court further held that petitioner's argument that he had accumulated ten years' physical presence after the service of the OSC was foreclosed by its prior decision in *McBride* v. *INS*, 238 F.3d 371 (5th Cir. 2001), which upheld the BIA's decision that IIRIRA's stop-time rule prohibits the restarting of the accrual time-period after deportation proceedings have begun. Pet. App. A22. Finally, the court ruled that petitioner's contention that IIRIRA's stop-time provisions may not be retroactively applied to his case was foreclosed by its prior decision in *Gonzalez-Torres* v. *INS*, 213 F.3d 899 (5th Cir. 2000).

ARGUMENT

Petitioner urges this Court to grant review to resolve the very narrow issue whether IIRIRA Section 309(c)(5)(A), which provides for the application of the stop-time rule of 8 U.S.C. 1229b(d)(1) to transitional deportation cases instituted before IIRIRA's enactment, became effective on IIRIRA's enactment date of September 30, 1996, or on IIRIRA's general effective date of April 1, 1997. See Pet. 7. That issue affects only a very limited class of aliens—*viz.*, aliens whose

applications for suspension of deportation, a form of relief that Congress has prospectively repealed, were denied by the BIA based on the stop-time rule during a six-month period that ended over five years ago. Only one court of appeals has addressed that precise issue in a published decision. With the passage of time, it is increasingly unlikely that the issue will arise in other courts of appeals. Moreover, even though the court of appeals' conclusion in the unpublished decision below conflicts with the decision of the Ninth Circuit in *Astrero*, the construction of IIRIRA Section 309(c)(5)(A) by the BIA and the court of appeals in the instant case is correct. Accordingly, further review is not warranted.

1. a. The court of appeals' decision on the effective date of the stop-time rule of IIRIRA Section 309(c)(5)(A) is of little continuing importance. That issue affects only those aliens who sought to apply for suspension of deportation, pursuant to former 8 U.S.C. 1254(a) (1994), and whose applications were denied by the BIA on the basis of the stop-time rule between September 30, 1996 and March 31, 1997. The majority of those aliens were required, under IIRIRA Section 309(c)(4), to file petitions for review within 30 days of any such final order of deportation issued during that time. See 110 Stat. 3009-626.[7] Thus, the effective-date issue is almost entirely a closed one and remains an ongoing controversy only to the extent that such

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[7] Aliens whose final deportation orders were issued before October 31, 1996, were required to file petitions for review within 90 days of the issuance of the final order, or, in the case of an alien convicted of an aggravated felony, within 30 days of the issuance of the final order. See IIRIRA § 309(c)(4), 110 Stat. 3009-626.

petitions for review remain open and pending in the courts of appeals after five years.

b. The Ninth Circuit's decision in *Astrero* v. *INS*, 104 F.3d 264 (1996), is the only published court of appeals decision squarely addressing the issue whether IIRIRA Section 309(c)(5) became effective on IIRIRA's enactment date of September 30, 1996, or on IIRIRA's general effective date of April 1, 1997. The effective-date issue arose in *Astrero* because that case was argued to and decided by the court of appeals after IIRIRA was enacted but before April 1, 1997.[8] Although the Ninth Circuit has since extended its holding in *Astrero* to apply to certain suspension of deportation cases heard by an immigration judge between September 30, 1996, and April 1, 1997, even when the alien was finally ordered deported by the BIA *after* April 1, 1997, those cases involve a very limited set of unusual circumstances and do not elevate the issue of the effective date of the stop-time rule of IIRIRA Section 309(c)(5)(A) to one of continuing national importance.[9] At most, this issue affects only the narrow

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[8] In *Gonzalez-Torres*, the alien was ordered deported by the BIA on May 17, 1999, more than two years after IIRIRA's general effective date. See 213 F.3d at 901. Thus, the issue whether IIRIRA's stop-time rule became effective before April 1, 1997, was not squarely before the court or the BIA in that case. In *Sibanda* v. *INS*, 282 F.3d 1330 (10th Cir. 2002), the BIA initially ruled, before April 1, 1997, that the alien was ineligible for suspension of deportation because of the stop-time rule. After April 1, 1997, the Tenth Circuit remanded the case to the BIA, which again applied the stop-time rule to bar the alien's application for relief. The Tenth Circuit subsequently affirmed, holding that "the stop-time rule unambiguously applies to orders to show cause issued before, on, or after September 30, 1996." *Id.* at 1333.

[9] See *Otarola* v. *INS*, 270 F.3d 1272 (9th Cir. 2001) (remanding case where INS filed what that court termed a "frivolous appeal"

and finite group of aliens whose suspension of deportation applications were adjudicated by an immigration judge or the BIA between September 30, 1996, and April 1, 1997.

c. Even if the issue whether the stop-time rule of IIRIRA Section 309(c)(5)(A) became effective on September 30, 1996, or April 1, 1997, might still arise on occasion in future cases, the application of that stop-time rule affects only aliens who sought to apply for suspension of deportation, pursuant to former 8 U.S.C. 1254(a) (1994), in deportation proceedings commenced under pre-IIRIRA law. For removal proceedings commenced on or after April 1, 1997, suspension of deportation has been repealed and replaced by a new form of relief known as "cancellation of removal," which is subject to different substantive terms of eligibility. See 8 U.S.C. 1229b. Thus, the issue in this case concerns only deportation proceedings affected by IIRIRA's transitional rules, and does not implicate any removal proceedings under the permanent provisions of IIRIRA.

The category of aliens who are subject to IIRIRA's transitional rules is steadily diminishing in number and will be depleted when the aliens in that group complete their administrative proceedings. The Court has denied several certiorari petitions raising issues that arise only under the transitional rules of IIRIRA, including two

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of the immigration judge's pre-April 1, 1997 determination that the stop-time rule was not yet effective); *Guadalupe-Cruz* v. *INS*, 240 F.3d 1209, 1212 (9th Cir. 2001) (remanding case where immigration judge committed "serious procedural error" in holding that stop-time rule applied before April 1, 1997); *Castillo-Perez* v. *INS*, 212 F.3d 518 (9th Cir. 2000) (remanding case where alien received ineffective assistance of counsel in proceedings before immigration judge before April 1, 1997).

petitions raising similar issues involving the application of the stop-time rule in transitional cases. See *Appiah* v. *INS*, 531 U.S. 857 (2000); *Tefel* v. *Reno*, 530 U.S. 1228 (2000); see also *LaGuerre* v. *Reno*, 528 U.S. 1153 (2000); *Reno* v. *Goncalves*, 526 U.S. 1004 (1999); *Reno* v. *Navas*, 526 U.S. 1004 (1999). There is no basis in this case for a different result.

2. a. The decisions of the BIA and the court of appeals, holding that IIRIRA Section 309(c)(5) was made effective immediately upon IIRIRA's enactment to pending cases, are correct. Section 309(a) of IIRIRA provides that, in general, the effective date for Title III-A of IIRIRA (Sections 301-308) is April 1, 1997, the "title III-A effective date." See IIRIRA 309(a), 110 Stat. 3009-625. IIRIRA Section 309(a) qualifies that general rule by providing, *inter alia*, that, "*[e]xcept as provided in this section* * * * this subtitle and the amendments made by this subtitle" shall take effect on April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625 (emphasis added). IIRIRA Section 309(c)(1), which establishes transition rules for "aliens in proceedings," also states that the provisions in IIRIRA Title III-A, including the new stop-time rule of 8 U.S.C. 1229b(d), "shall not apply" to "an alien who is in * * * deportation proceedings [before] the title III-A effective date [April 1, 1997]." 110 Stat. 3009-625.[10] But IIRIRA Section 309(c)(1) in turn qualifies that general rule regarding effective dates by making it "[s]ubject to the

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[10] As initially enacted, IIRIRA Section 309(c)(1) provided that the amendments made by IIRIRA Title III-A would not apply to aliens in deportation proceedings "as of" the Title III-A effective date. See 110 Stat. 3009-625. Congress subsequently amended IIRIRA Section 309(c)(1) to replace "as of" with "before." For a discussion of the significance of that amendment, see pp. 15-17, *infra*.

succeeding provisions forth in this subsection [*i.e.*, IIRIRA Section 309(c)]." IIRIRA § 309(c)(1), 110 Stat. 3009-625.

This case involves one of those "succeeding provisions," set forth at IIRIRA Section 309(c)(5)(A) (as amended by NACARA Section 203(a)(1)), which specifically provides that the new stop-time rules of "[p]aragraphs (1) and (2) of [8 U.S.C. 1229b(d)] * * * shall apply to orders to show cause * * * issued before, on, or after the date of the enactment of [IIRIRA]." 111 Stat. 2196. Consequently, as a qualification to the general rule of IIRIRA Section 309(c)(1) that amendments made by IIRIRA Title III-A do not apply before April 1, 1997, the transitional rule of IIRIRA Section 309(c)(5)(A) applies immediately to pending cases of aliens, like petitioner, who were in proceedings before April 1, 1997.

That point is reinforced by the fact that the statute specifically provides that it shall apply broadly to orders to show cause issued "before, on, or after the *date of the enactment*" of IIRIRA. 111 Stat. 2196 (emphasis added). Congress's choice of IIRIRA's date of enactment as a reference point indicates that it intended the transitional stop-time rule to become effective immediately upon IIRIRA's enactment date of September 30, 1996. Had Congress intended the transitional provision not to be given effect until April 1, 1997, it would have referred to IIRIRA's "title III-A effective date" in Section 309(c)(5)(A), as it had elsewhere in IIRIRA (including Section 309(a)), rather than to IIRIRA's "date of enactment."

b. The Ninth Circuit's contrary application of IIRIRA Section 309(c)(5)(A) in *Astrero* is incorrect. In *Astrero*, the Ninth Circuit held that IIRIRA's new stop-time rule did not render the alien in that case

ineligible for suspension of deportation because, according to the court, under IIRIRA Section 309(a), the stop-time rule did not become effective until April 1, 1997. *Astrero*, 104 F.3d at 266.

As the BIA pointed out in *N-J-B-*, however, the Ninth Circuit erroneously relied on a superseded version of IIRIRA Section 309(c)(1) in reaching that conclusion. See *N-J-B-*, 21 I. & N. Dec. at 816 & n.6. The Ninth Circuit's decision was predicated on the language of IIRIRA Section 309(c)(1) as originally enacted, which provided that, subject to the succeeding provisions in that subsection, the new rules of IIRIRA Title III-A were not to be applied to aliens who were in deportation proceedings "*as of*" IIRIRA's effective date, April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625 (emphasis added). On October 11, 1996, however, Congress amended IIRIRA Section 309(c)(1) by replacing "as of" with "before." See Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657.

By replacing "as of" with "before," Congress made clear that IIRIRA Section 309(c)(5)'s transitional rule was to be applied to all aliens who were placed in deportation proceedings "before" April 1, 1997, even if the alien's administrative proceedings were also completed before April 1, 1997. See *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its enactment to have a real and substantial effect."). Before that amendment, the "as of" language of IIRIRA Section 309(c)(1) might have suggested that the new rules would not take effect until April 1, 1997, when it could be determined which aliens were in deportation proceedings "as of" that date. In light of the amendment to that provision, however, it is clear that Congress intended the new method of measuring continuous physical presence to be applied

immediately upon enactment to all aliens in deportation proceedings "before" April 1, 1997—including petitioner.

c. Finally, although no court of appeals other than the Ninth Circuit in *Astrero* has ruled on the specific issue whether the stop-time rule of IIRIRA Section 309(c)(5)(A) applies in the case of an alien such as petitioner, whose case was adjudicated by the BIA before April 1, 1997, every other court of appeals to address issues involving the effective date of IIRIRA Section 309(c)(5) has stated that that provision became effective on September 30, 1996, IIRIRA's enactment date. See *Sibanda* v. *INS*, 282 F.3d 1330, 1333 (10th Cir. 2002) ("[T]he language Congress employed makes the stop-time measure universally applicable to orders to show cause issued before, on, or after IIRIRA's enactment date."]; *Pinho* v. *INS*, 249 F.3d 183, 188 (3d Cir. 2001) ("The plain meaning of [Section 309(c)(5) and the amendments made by NACARA] establishes Congress's intent to apply the stop-time rule to all cases, including those pending as of September 30, 1996."); *Ashki* v. *INS*, 233 F.3d 913, 917 (6th Cir. 2000) ("IIRIRA section 309(c)(5) * * * took effect immediately upon enactment."); *Gonzalez-Torres*, 213 F.3d at 903 (upholding "application of the IIRIRA's stop-time provision to deportation proceedings pending at the time of the statute's enactment"); *Appiah* v. *United States INS*, 202 F.3d 704, 707-708 (4th Cir.) ("After IIRIRA's enactment, the initiation of deportation proceedings stops the clock—an alien can no longer accrue years of continuous physical presence once proceedings have begun."), cert. denied, 531 U.S. 857 (2000). As we have explained, the Ninth Circuit's sole deviation from that otherwise uniform line of authority

has little prospective significance. Accordingly, this Court's review is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

DONALD E. KEENER
LINDA S. WERNERY
Attorneys

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